

The Administrative Law Judge (ALJ) found the claimant suffered a 10 percent functional impairment through October 9, 2002, and a 64.5 percent work disability thereafter based upon a 100 percent wage loss and a 29 percent task loss.

The respondent requests review of the nature and extent of claimant's disability, if any. Respondent contends the claimant has failed to establish that she has incurred any additional functional impairment as a result of her work-related accident. In the alternative, respondent argues that claimant's work disability should be based upon Dr. Philip R. Mills' task loss opinion and, because claimant failed to make a good faith effort to find appropriate employment, a wage should be imputed to her based upon Mr. Dan R. Zumalt's wage loss testimony.

Conversely, claimant argues she has met her burden of proof to establish that she suffered permanent impairment as a result of her work-related accident. Claimant argues her work disability should be increased to 68 percent based upon Dr. Edward J. Prostic's task loss opinion and, because she has made an unsuccessful good faith effort to find appropriate employment, a 100 percent wage loss as determined by the ALJ.

The sole issue for determination by the Board is the nature and extent of disability, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board affirms the ALJ's Award. The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

The respondent's primary argument is that claimant had suffered a fall at home before the work-related accident and her low back condition was caused by the non-occupational accident.

Respondent relies upon claimant's history of a fall at home and the fact the claimant had received treatment for her back after that incident. But claimant had not missed any work as a result of that accident. And claimant testified that the chiropractic treatment was for spasms from lifting patients at work. Moreover, when questioned about the chiropractic treatment the claimant agreed with the chiropractor's notes which indicated that over the course of her treatment her pain level had decreased from an 8 to zero on her last visit on February 4, 2002.¹ As claimant stated, she had gotten better.

Although Dr. Mills concluded that claimant's condition preexisted her work-related accident, he agreed that if the medical records indicated claimant's condition had improved before her work-related accident, such a history would point to the February 2002 work accident as the cause of her current condition. Dr. Mills testified:

¹ Swonger Depo., (Jul. 8, 2003) at 57.

Q. Now, if the chiropractic records indicated that she was doing great and been released from care, back before February 12th, 2002, that would mitigate toward a determination that the source of this injury would have been from this work injury back on February 12th of 2002?

A. That's possible.

Q. I mean, that's the direction that would point, would it not?

A. Yes.²

Dr. Prostic concluded claimant's condition was caused by the February 2002 lifting incident at work for respondent. The doctor further stated that he was not convinced claimant had any preexisting impairment because she did not have a history of extensive time lost from work, inability to perform her normal activities nor symptoms that did not resolve.

The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.³

The claimant's testimony was that her back condition had improved before the February 2002 incident at work. It was not disputed that the chiropractic records indicated she was not complaining of pain at her last visit before the work accident. Dr. Mills agreed that a history of improvement before the work accident would point toward the work accident as being the cause of her current condition. Finally, Dr. Prostic concluded claimant did not have a preexisting impairment and the February 2002 incident at work was the cause of claimant's current problems. The Board affirms the ALJ's determination claimant suffered accidental injury arising out of and in the course of her employment which caused her current condition and disability.

The ALJ's Award contains a detailed recitation of the facts and conclusions regarding claimant's functional impairment and work disability. The Board adopts and affirms those findings and conclusions.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge John D. Clark dated September 25, 2003, is affirmed.

² Mills Depo. at 36.

³ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

IT IS SO ORDERED.

Dated this _____ day of April 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
 Gary K. Albin, Attorney for Respondent and its Insurance Carrier
 John D. Clark, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director